

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CHRISTOPHER M. DEVINE, )  
Plaintiff, )  
 )  
v. ) C.A. No. 04-12186-NG  
 )  
STOP AND SHOP COMPANIES, )  
Defendant. )

MEMORANDUM AND ORDER

For the reasons stated below, plaintiff shall (1) pay the filing fee for this action or seek a waiver of it; and (2) demonstrate good cause why this action should not be dismissed without prejudice.

FACTS

On October 12, 2004, Christopher Devine, a resident of Mansfield, Massachusetts, filed a number of documents with the Court concerning his employment at Stop and Shop Companies. Devine did not enclose the \$150.00 filing fee for this action, nor did he file an application to waive the filing fee.

Devine states that he has a learning disability and has been diagnosed as HIV-positive and alleges that Stop and Shop failed to accommodate these disabilities during his employment. He has included copies of a March 20, 2003 order from the Massachusetts Commission Against Discrimination ("MCAD") denying his claims and a November 20, 2003 notice affirming the dismissal on appeal. Devine

does not allege or otherwise indicate whether the Equal Employment Opportunity Commission (the "EEOC") has completed its review of his Americans with Disabilities Act ("ADA") claims and whether it has issued a "right to sue" letter.

#### ANALYSIS

##### I. Plaintiff Must Pay the Filing Fee or Seek a Waiver of It

A party filing a civil action in this Court must either (1) pay the \$150 filing fee for civil actions or (2) seek to be granted in forma pauperis by filing an application to proceed without prepayment of the filing fee. See 28 U.S.C. § 1914 (filing fee for civil actions); Fee Schedule for the District of Massachusetts; 28 U.S.C. § 1915 (proceedings in forma pauperis). For the convenience of litigants, this Court provides a standardized, double-sided form for fee waiver applications entitled "Application to Proceed Without Prepayment of the Filing Fee and Affidavit." Because Devine has not submitted the filing fee or an application for waiver of prepayment of the filing fee, he shall be granted additional time to do so.

##### II. The Court May Screen this Action

When a party seeks to file an action without prepayment of the filing fee, summonses do not issue in order to allow the Court to review the plaintiff's complaint to determine

if it satisfies the substantive requirements of the federal in forma pauperis statute. See 28 U.S.C. § 1915. Section 1915 authorizes federal courts to dismiss actions in which a plaintiff seeks to proceed without prepayment of fees if the action lacks an arguable basis either in law or in fact, Neitzke v. Williams, 490 U.S. 319, 325 (1989), or if the action fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2).

III. Absent Exhaustion Before the  
EEOC, This Court May Not Consider  
Plaintiff's Federal Employment-Law Claims

It appears that Devine is attempting to bring his claims pursuant to Title I of the ADA, 42 U.S.C. § 12101-12213, and Chapter 151B, Mass. Gen. Laws ch. 151B, § 1, et seq. ("Chapter 151B). Prior to bringing an action in federal court under the ADA, the ADA mandates compliance with the administrative procedures specified in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. See 42 U.S.C. § 12117 (incorporating by reference, inter alia, 42 U.S.C. § 2000e-5(f)(1)); Bonilla Muebles J.J. Alvarez, Inc., 194 F.3d 275, 277 (1<sup>st</sup> Cir. 1999). Such compliance must occur before a federal court may entertain a suit that seeks recovery for an alleged violation of Title I of the ADA. Bonilla, 194

F.3d at 277. Similarly, in order to bring claims of discrimination under Chapter 151B pursuant to this Court's supplemental jurisdiction,<sup>1</sup> a plaintiff must first submit a complaint to MCAD within six months of the alleged unlawful conduct. Mass. Gen. Laws ch. 151B §§ 5-9; accord Andrews v. Arkwright Mut. Ins. Co., 673 N.E.2d 40, 41, 423 Mass. 1021, 1021 (1996).

In states such as Massachusetts, which has its own state anti-discrimination agency and a "work-sharing" agreement with the EEOC, a charge filed with the MCAD, the state agency, is automatically referred to the EEOC after MCAD's initial review. Thus, claims filed with MCAD or the EEOC are effectively filed with both agencies. Seery v. Biogen, Inc., 203 F. Supp. 2d 35, 43 (D. Mass. 2002); see Davis v. Lucent Technologies, Inc., 251 F.3d 227, 230 n. 1

---

<sup>1</sup>Absent a federal question, this Court, of course, would not have original jurisdiction to consider plaintiff's state-law based employment claims because it does not appear that diversity of citizenship exists. See 28 U.S.C. § 1332 (diversity jurisdiction); Caterpillar Inc. v. Lewis, 519 U.S. 61, 69 (1996) (diversity jurisdiction requires complete diversity: the citizenship of each plaintiff must be diverse from each defendant); 28 U.S.C. § 1367(a) (in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution).

(1<sup>st</sup> Cir. 2001).

After the filing an administrative charge for Title I ADA claims, the EEOC must reach a final determination on the claims and render a decision stating whether it will pursue them in federal court or whether the complainant will be issued a "right-to-sue" letter. Absent a final determination or a "right-to-sue" letter from the EEOC, a party generally may not bring a civil action under Title I of the ADA in federal court. Bonilla, 194 F.3d 278; accord McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 504 (1<sup>st</sup> Cir. 1996) (Title VII plaintiff must file a timely EEOC charge and receive notice of a right to sue); Davis v. North Carolina Dep't of Corr., 48 F.3d 134, 137-138 (4<sup>th</sup> Cir. 1995) ("right-to-sue" letter is essential to the initiation of a private employment discrimination action under Title VII).

Here, because plaintiff does not allege that the EEOC has issued a "right-to-sue" letter for his Title I ADA claims, his ADA claims are subject to dismissal without prejudice.<sup>2</sup> See, e.g., Tapia-Tapia v. Potter, 322 F.3d 742, 744-745 (1<sup>st</sup> Cir.

---

<sup>2</sup>In contrast to the ADA, a person claiming employment discrimination pursuant to Chapter 151B may bring a civil action only at the expiration of 90 days after the filing of a complaint with the MCAD, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred. See Mass. Gen. Laws ch. 151B, § 9.

2003) (where district court gave party the benefit of the doubt by affording him an opportunity, through a show-cause order, to demonstrate that he had satisfied the preconditions for bringing suit on the ADEA claim and appellant was unable to make the requisite showing, court could dismiss action); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (although the filing of an administrative charge is not a jurisdictional prerequisite to suit, a plaintiff may not circumvent the requirement); accord Oscar Mayer & Co. v. Evans, 441 U.S. 750, 757 (1979) (same); Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1<sup>st</sup> Cir. 1996) (pro se status does not relieve an employee of the obligation to meet procedural requirements established by law).

If plaintiff's federal-law based ADA claims are dismissed without prejudice, then this Court will lack subject-matter jurisdiction over plaintiff's state-law based Chapter 151B claims, see, e.g., 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction), and may decline to exercise supplemental jurisdiction over them. See, e.g., Gonzalez-De Blasini v. Family Dep't, 377 F.3d 81, 89 (1<sup>st</sup> Cir. 2004) (as a general rule, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit will trigger the dismissal without prejudice of any supplemental state law claims) (citing Rodriguez v. Doral Mortgage Corp., 57 F.3d

1168, 1177 (1<sup>st</sup> Cir. 1995)).<sup>3</sup>

CONCLUSION

ACCORDINGLY, plaintiff's claims are subject to dismissal without prejudice without further notice under 28 U.S.C. § 1915(e)(2) within thirty-five (35) days of the date of this Memorandum and Order unless before that time plaintiff either pays the filing fee or submits an application to proceed without prepayment of fees and demonstrates good cause why this action should not be dismissed for the reasons stated above.

The Clerk shall send plaintiff an Application to Proceed Without Prepayment of Fees.

SO ORDERED.

Dated at Boston, Massachusetts, this 21st day of October, 2004.

s/ Nancy Gertner  
NANCY GERTNER  
UNITED STATES DISTRICT JUDGE

---

<sup>3</sup>Such a dismissal normally does not implicate an immediate time bar to the filing of any state-law based claims in state court. See Mass. Gen. Laws ch. 260, § 32 (claims dismissed for "any matter of form" may be re-filed in state court for one year after their dismissal); Duca v. Martins, 941 F. Supp. 1281, 1295 n. 14 (D. Mass. 1996) (dismissing state law claim without prejudice after dismissing federal claims because § 32 gave plaintiff one year in which to re-file his claim in state court); Liberace v. Conway, 574 N.E.2d 1010, 1012, 31 Mass. App. Ct. 40, 42-44 (1991) (Mass. Gen. Laws ch. 260 § 32 applies to state law claims dismissed by federal court declining to exercise supplemental jurisdiction).